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SANDRA A. HARRAH, CLERK

BY: ~~Kelly Gresham~~

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

INA AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER

Defendant.

No. P1300CR201001325

MOTION TO SEVER COUNTS
(Oral Argument Requested)

COMES NOW THE DEFENDANT, by and through his attorney undersigned, and respectfully moves this Court for an order severing Counts 3 through 10 from Counts 1 and 2;

AS GROUNDS THEREFORE, the defendant respectfully submits that severance of Counts 3 through 10 is necessary to promote a fair determination of the guilt or innocence of Mr. DeMocker and therefore required pursuant to Rule 13.4, Arizona Rules of Criminal Procedure, Article 2 §4 and §24 of the Constitution of the State of Arizona, as well as the Fourth, Sixth and Fourteenth Amendment to the United States Constitution.

This motion is further supported by the attached memorandum.

1 MEMORANDUM

2 Facts:

3 This Court is in a unique position with regard to the facts of all of the allegations
4 in that this Court has already sat through a portion of one trial. As such, only a brief
5 recitation of what has already occurred in this case will be provided.

6 Mr. DeMocker was originally Indicted on October 31, 2008, for Count 1, First
7 Degree Premeditated Murder and Count 2, Burglary as a Dangerous Offense in CR 2008-
8 1339. These counts are alleged to have occurred on July 2, 2008. After a Motion to
9 Remand was granted, Mr. DeMocker was once again Indicted for the same charges under
10 the same cause number on February 6, 2009. On November 12, 2010, Mr. DeMocker's
11 trial in that case ended in a mistrial.

12 Prior to the granting of a mistrial, On September 29, 2010, Mr. DeMocker was
13 Indicted in CR 2010-0461 on 7 felony counts involving fraud, fraud schemes, false
14 evidence and 1 misdemeanor count of Contributing to the Delinquency of a Minor. The
15 charges in CR 2010-0461 all involve allegations stemming from allegations of a
16 fraudulent "anonymous e-mail," and a fraudulent "voice in the vent statement." All of
17 the allegations in CR 2010-0461 are from events that occurred over 10 months after the
18 alleged Murder and Burglary counts in CR 2008-1339.

19 On December 10, 2010, Mr. DeMocker was Indicted in this cause number for the
20 current charges. Counts 1 and 2 in the current case number are the same Premeditated
21 Murder and Burglary charges which were contained in the original CR 2008-1339
22 Indictment. Count 3 in the current case is a new charge of Fraudulent Schemes and
23 Artifices stemming from allegations regarding funds obtained from a Testamentary Trust.
24 This Count is alleged to have occurred at least one month after the Murder and Burglary
25 charges of Counts 1 and 2. Counts 4 through 10 are just a modified and condensed
26 version of the charges Indicted in CR 2010-0461.

27 In effect, the State in this current Indictment has charged Mr. DeMocker with
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1 alleged subsequent Other Act 404(b) evidence to the original Murder and Burglary
2 charges which were mistried. Defendant submits that this is improper and Counts 3
3 through 10 should be severed from the trial of Counts 1 and 2.

4 Legal Analysis:

5 Rule 13.4(a), Arizona Rules of Criminal Procedure governs when severance
6 should be granted. It states:

7 Whenever 2 or more offenses or 2 or more defendants have been joined for trial,
8 and severance of any of any or all offenses, or of any or all defendants, or both, is
9 necessary to promote a fair determination of the guilt or innocence of any defendant of
any offense, the court may on its own initiative, and shall on motion of a party, order
such severance.

10 “The rules on joinder and severance are intended to further not only liberal joinder but
11 also *liberal severance*. Where there is any doubt, it must be resolved in favor of the
12 defendant.” *State v. Roper*, 140 Ariz. 459, 462, 882 P.2d 464, 467 (App. 1984)(citations
13 omitted)(emphasis in the original.) In order for Mr. DeMocker to get a fair determination
14 of his guilt or innocence of the charges of Count 1, Murder and Count 2, Burglary, the
15 alleged subsequent Other Act 404(b) counts 4 through 10 must be severed.

16 Rule 13.4 and Rule 13.3 should be read and considered together. *State v. Kinkade*,
17 140 Ariz. 91, 608 P.2d 801 (1984). While Rule 13.4 governs severance, Rule 13.3
18 governs joinder. Permissible joinder of counts may occur pursuant to Rule 13.3(a) if the
19 counts:

- 20 (1) Are of the same or similar character; or
21 (2) Are based on the same conduct or are otherwise connected together in their
22 commission; or
23 (3) Are alleged to have been part of a common scheme or plan.

24 Clearly the Murder and Burglary charges are not of the same or similar character of the 8
25 charges involving fraud and fraudulent schemes and therefore counts 3 through 10 are not
26 properly joined pursuant to Rule 13.3(a)(1).

27 Offenses may be joined pursuant to Rule 13.3(a)(2), only if the “offenses arose out
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1 of a series of connected acts, and the evidence as to each count, of necessity, overlaps:
2 where most of the evidence admissible in proof of one offense is also admissible in proof
3 of the other; or where there are common elements of proof in the joined offenses.” *State*
4 *v. Bravo*, 171 Ariz. 132, 139, 829 P.2d 222, 329 (App. 1991). “The ‘otherwise connected
5 together in their commission’ language addresses whether evidence of the two crimes
6 was so intertwined and related that much the same evidence was relevant to and would
7 prove both, and the crimes themselves arouse out of a series of connected acts.” *State v.*
8 *Prion*, 203 Ariz. 157, 162, 52 P. 3d 189, 194 (2002). “Rule 13.3(a)(2) should be
9 interpreted narrowly.” *Prion*, 203 Ariz. at 163, 52 P.3d at 195.

10 The offenses alleged in Counts 1 and 2, Murder and Burglary, are in no way based
11 upon the same conduct or otherwise connected together in their commission with the
12 fraud offenses alleged in Counts 3 through 10. The Murder and Burglary allegations
13 stem from a series of completely distinct and different acts. In fact, counts 4 through 10
14 are alleged to have occurred while Mr. DeMocker was in-custody pending trial for
15 Counts 1 and 2. Although the Indictment states that Count 3 occurred “On or between
16 August, 2008 through October, 2009,” most if not all of the allegations the state is
17 alleging with regard to the Testamentary Trust count occurred while Mr. DeMocker was
18 in-custody. The evidence the State needs to introduce at trial to try to prove who caused
19 the death of Virginia Carol Kennedy on July 2, 2008, and how the death occurred, is
20 completely different from the evidence the State needs to introduce at trial to try and
21 prove the fraud counts which the State is alleging Mr. DeMocker committed while sitting
22 in his jail cell. The counts are not properly joined pursuant to Rule 13.3(a)(2).

23 Rule 13.3(a)(3), allows joinder if the offense are alleged to have been part of a
24 common scheme or plan. The Arizona Supreme Court, in *State v. Ives*, 187 Ariz. 102,
25 927 P. 2d 762 (1996) held that the term “common scheme or plan” was to be interpreted
26 narrowly. A common scheme or plan is not merely a “visual connection” but are acts of
27 a particular plan of which the charged crime is a part. *Ibid.* In other words, in this case,

1 the State must show that the fraud charges contained within Counts 3 through 10 were
2 part of Mr. DeMocker's over-all plan when, according to the State, he committed the
3 Murder and Burglary in Counts 1 and 2. Obviously, given that the fraud charges of
4 Counts 3 through 10 do not even occur until after Mr. DeMocker has been arrested and
5 charged for the Murder and Burglary charges, Counts 3 though 10 could not have been
6 part of the particular plan of Counts 1 and 2. The component acts of a common scheme
7 or plan must be sufficiently related to be considered a single criminal cast. *Ives, supra*.
8 That is not the case here. The counts have not been joined properly pursuant to Rule
9 13.3(a)(3).

10 It is clear that the reason the State Indicted Counts 3 though 10 with the original
11 counts of Murder and Burglary once the original trial was mistried was so it could
12 introduce subsequent Other Act 404(b) evidence into the trial for the original Murder and
13 Burglary charges. This is improper joinder and done to prejudice the jury against Mr.
14 DeMocker. The only way to insure that Mr. DeMocker will get a fair determination of
15 his guilt or innocence to Counts 1 and 2 is to sever out Counts 3 though 10.

16 Conclusion:

17 For all of the above listed reasons, defendant respectfully submits that severance
18 of Counts 3 through 10 is necessary to promote a fair determination of the guilt or
19 innocence of Mr. DeMocker and therefore required pursuant to Rule 13.4, Arizona Rules
20 of Criminal Procedure, Article 2 §4 and §24 of the Constitution of the State of Arizona,
21 as well as the Fourth, Sixth and Fourteenth Amendment to the United States Constitution.

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Respectfully submitted this 8 day of August, 2011.

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By  
Gregory T. Parzych

1 Original of the foregoing pleading
2 filed this 2 day
3 of August, 2011, to:

4 Clerk of Court
5 Yavapai County Superior Court
6 120 South Cortez St.
7 Prescott, Arizona 86303

8 Copy of the foregoing pleading
9 mailed this 2 day
10 of August, 2011, to:

11 The Honorable Warren R. Darrow
12 Jeffrey Paupore, Steve Young, Office of the Yavapai County Attorney

13 Craig Williams

14 By 

15 Gregory T. Parzych